IN THE

Supreme Court of the United States

October Term, 1948.

No. 352-353

KENT FOOD CORP. and CLARK-IGER FOOD PRODUCTS CO., INC.,

Petitioners,

AGAINST

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari and Brief in Support Thereof.

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INDEX.

TABLE OF CASES.

STATUTES CITED.

Supreme Court of the United States

OCTOBER TERM, 1948.

KENT FOOD CORP. and CLARK-IGER FOOD PRODUCTS CO., INC.,
Petitioners,

AGAINST

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States.

Your petitioners, Kent Food Corp. and Clark-Iger Food Products Co., Inc. respectfully pray that a Writ of Certiorari issue to review:

A. The order of the Circuit Court of Appeals of the United States for the Second Circuit denying the petitioners' motion to dismiss the appeal from the order and decree of the District Court of the United States for the Eastern District of New York, on the ground that the said appeal was not timely taken.

B. The order and decree of the said Circuit Court of Appeals reversing the order and decree of the District

Court aforesaid and remanding the cause for elimination of the provisions of the decree which permit the release of the libelled goods for export and the substitution of provisions appropriate to condemnation.

And in support of their petition, your petitioners respectfully show to this Honorable Court:

Statement of the Matter Involved.

Libels for condemnation in accordance with the Federal Food, Drug and Cosmetic Act (21 U. S. C. 301 *et seq.*) were filed against a number of cases containing bottles of tomato catsup (Record, p. 3). The libels were issued out of the District Court of the United States for the Eastern District of New York.

One of the lots which was libelled belonged to and was the property of petitioner Kent Food Corp. At the time that the libel was filed, this merchandise was in the place of business of that petitioner, it was marked for export (Record, p. 12, fol. 36).

The facts are somewhat different in the case of the second libel which was filed against property belonging in part to the petitioner, Kent Food Corp. and the balance to petitioner, Clark-Iger Food Products Co. Inc. This libel affected some cases of tomato catsup located in the warehouse of the petitioner, Kent Food Corp. and some cases located in the warehouse of the Sweet Life Food Corp. At the time of the issuance of the libel, all of these cases were packed and strapped for export. In fact the United States government had purchased these specific cases from Sweet Life Food Corp. for export (Record, p. 13, fol. 38).

The contents of the bottles of catsup did not come up to the high standards in effect in the United States. They are and were, however, fit for human consumption as food

and the District Court so found (Record, p. 14, fol. 41; p. 22, fol. 65; p. 24, fol. 70; p. 44, fol. 133). At the point of origin of these goods, the State of Michigan permitted that they be sold for export purposes. The Food and Drug Administration was at all times aware of the proposed use and it offered no objection (Record, p. 13, fol. 39).

A laboratory report of a test of this tomato catsup was to the effect that the tomato catsup

> "* * * is satisfactory for human consumption and can be sold to those countries whose standard for mold count is not quite as high as the United States" (Record, pp. 21 and 22, fol. 65).

After the libels were filed, the claimant petitioners appeared and consented to a decree of condemnation under the Food and Drug Act and requested permission in accordance with 21 U. S. C. 334 (d) to sell the product for export purposes. The consent to a decree of condemnation was for the purpose of expediting matters, avoiding the delay incident to a trial of the issues presented by the libels and securing the immediate release of the goods for export (Record, p. 12).

A decree of condemnation was entered (Record, p. 26) and the District Court directed the release of the libelled goods upon the filing of a proper bond. The decree provided that the goods should be packed for export shipment under the supervision of the Food and Drug Administration of the Federal Security Agency and released to the claimant petitioners.

Following the entry of the decree of condemnation, the government applied for reargument of the original motion and to vacate that decree on the alleged ground that the goods had been offered for domestic sale and that the Court lacked power to release the goods.

The Court granted reargument and again made a finding that the libelled goods were in fact fit for human consumption.

Its specific finding was that the food

> "* * * is fit for human consumption, is in accordance with the specifications of foreign purchasers and is not in conflict with the laws of the country to which it is to be sent" (Record, p. 45, fol. 133).

On the basis of such finding, the District Court adhered to its original decision and permitted export. It determined that the Food and Drug Act conferred power upon it to release the goods. The goods are still held in this country pursuant to stipulation that they will not be exported or destroyed pending final determination of this matter.

The Circuit Court of Appeals erroneously interpreted the decision of the District Court on the reargument to mean that the District Court had found as a fact,

> "That the claimants did not intend to export the goods but planned to dispose of them in the domestic market" (Record, p. 60, fol. 64).

This interpretation clearly finds no support in the record as appears from an examination of the specific language of the District Court in the opinion following reargument. The District Court said that its decision would not have been different even if as a fact the claimants had not originally intended the goods for export. The specific language of the District Court was,

> "therefore assuming, and even finding as a fact, that the claimants did not intend to export the

goods, but planned to dispose of them in the domestic market, I still adhere to my original determination."

Manifestly, this is not a finding of fact but is merely *arguendo,* an explanation of the Court's understanding of the statute.

The first decree (Record, p. 26) permitting the export of the libelled articles was entered in the District Court on July 16, 1947. The time to appeal from that decree expired October 15, 1947 (28 U. S. C. 230). An appeal was not taken within that time.

A motion was made by the libellant for reargument. The court granted reargument and upon such reargument, the original decision was adhered to. The order on the motion for reargument (Record, p. 46) was entered on October 29, 1947. This was more than three months after the date of the entry of the original order. The notice of appeal was served on December 17, 1947. The appeal was taken from the original decree (Record, p. 26) and from the decree after reargument (Record, p. 46).

A motion was made in the Circuit Court of Appeals to dismiss the appeal on the ground that it was not timely taken. The learned Circuit Court denied the motion without opinion.

The learned Circuit Court, on reversing the decree of the District Court and remanding the libels for elimination of the provisions permitting export of the libelled articles stated its opinion to be that the Court lacked power under the statute to permit such export. In its opinion of reversal, the learned Court held that goods which would be exempt from seizure and condemnation by virtue of 21 U. S. C. 381 (d) relating to goods for export could never thereafter become entitled to such exemption if such goods had at any time been offered for sale in domestic commerce.

The Basis Upon Which This Court Has Jurisdiction.

Petitioners seek a review by Certiorari pursuant to 28 U. S. C. 347 (a).

The date of the entry of the judgment sought to be reviewed is June 16, 1948. A petition for rehearing was denied and the order denying such petition was entered in the Circuit Court of Appeals, Second Circuit on July 19, 1948.

Questions Presented.

The questions presented by the case and on which review is sought by petitioners are as follows:

1. Was the appeal from the Decree of the District Court timely taken pursuant to the provisions of 28 U. S. C. 230?

2. Does 21 U. S. C. 334 (d) empower the District Court to permit the release for export of condemned articles which meet the standards established by 21 U. S. C. 381 (d)?

Reasons Relied on for the Allowance of the Writ.

Your petitioners contend that the decision of the Circuit Court of Appeals for the Second Circuit improperly construes the Federal Food, Drug and Cosmetic Act.

21 U. S. C. 342 establishes a standard of adulteration for goods in domestic commerce. 21 U. S. C. 381 (d) establishes a different standard of adulteration for goods to be exported to foreign countries. 21 U. S. C. 334 (d) contains provisions for the condemnation of goods which are adulterated. It does not distinguish between domestic or foreign goods. That statute permits the release of goods which have been condemned on condition that they

be sold in compliance with the Act. Your petitioners believe that if the goods conform to the standard of the statute, whatever that standard may be, the District Court has the power to direct their release and sale, and that the previous history of the goods is of no moment.

Your petitioners believe that goods which conform to the standards established by the Statute for export, may be exported in compliance with the Act. Since admittedly, the articles in question conform to the standards for export, the export of those goods would not be in violation of the statute. Such goods do not become branded with the ineradicable mark of Cain when they are libelled and condemned by reason of their shipment in domestic commerce. While the shipper may be liable to punishment for commission of crime, the articles themselves can be sold for export.

The question of the power of the Court, under the Act to permit the release of condemned articles for export is of first impression. Counsel for the petitioners have been unable to find a single precedent in any Circuit Court or in this Court. No pertinent precedent was referred to in any of the briefs in the Court below, except for some unreported decisions of a District Court. For the foregoing reasons, counsel is of the belief that this question is of first impression.

Your petitioners further believe that the decision rendered by the United States Circuit Court of Appeals on the appeal from the judgment and decree of condemnation was not in accord with the purpose and intent of Congress in enacting the Federal Food, Drug and Cosmetic Act, in that it was not the intent of Congress to effect the destruction of goods which are fit for human consumption and which are not adulterated within the meaning of the term as it is defined in the Statute.

Your petitioners further believe that this matter is of the utmost importance to all who are engaged in the ex-

port of goods to foreign countries. In view of the fact that there is no reported decision either of a District Court, of a Circuit Court of Appeals or of this Court on this question, those who deal in the export of commodities are uncertain as to their rights, and the power of the Court to afford relief under the Food and Drug Act. This uncertainty should be dispelled by a ruling of this Court.

Your petitioners further believe that the decision rendered by the United States Circuit Court of Appeals on the appeal from the decree was erroneous and improper because that learned Court misinterpreted the ruling of the District Court and therefore made a decision which was not in accord with the facts. The District Court did not find that the goods were knowingly sold in Domestic Commerce and the Circuit Court's conclusion to the contrary constitutes a ruling based upon facts which do not exist.

Your petitioners further believe that the decision rendered by the United States Circuit Court of Appeals was premised upon an incorrect hypothesis. It appears from its decision, that the Circuit Court was motivated to a great extent by its belief that the Act contains no provisions which constitute a deterrent to its violation and that it was therefore necessary to order the destruction of the goods to insure compliance with the Act in the future. The learned Circuit Court of Appeals overlooked the provisions of the Act which subject a violator thereof to punishment for crime.

Lastly, your petitioners urge that the Act contains provision for insuring compliance therewith apart from its penal sections. The Act and the decree which was made in this case, are to the effect that the owner of the condemned goods must file a bond; and that the further handling of the goods is subject to supervision by a governmental agency (Federal Security Agency). There is

no possibility of the goods being diverted from the export trade. The claimant has been subjected to considerable expense in complying with the directions of the decree of the District Court.

Your petitioners contend that the denial by the Circuit Court of Appeals of the motion to dismiss the appeal was erroneous because the effect of such ruling was to indefinitely extend the time of the respondent to appeal from the judgment of the District Court of the United States and constituted a nullification of Title 28, U. S. C., Section 230.

Your petitioners therefore verily believe that the application presents a case cognizable under the rules of this Honorable Court and one fundamentally appropriate for review by this Honorable Court.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a transcript of the record upon which its said decision and judgment were made and that the said judgment of the Circuit Court of Appeals may be modified by this Honorable Court so as to provide that the order and decree reversing the order and decree of the District Court of the United States for the Eastern District of New York may be vacated and set aside and that the decree of the District Court of the United States for the Eastern District of New York may be affirmed and that your petitioners may be permitted in compliance with the said decree of the District Court of the United States for the Eastern District of New York to export the merchandise which was libelled and that your petitioners may have

such other and further relief in the premises as to this Honorable Court may seem just and proper.

And your petitioners will ever pray, etc.

Dated: New York, October 14, 1948.

KENT FOOD CORP. and CLARK-IGER FOOD PRODUCTS CO., INC.

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and

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The Decision of the Circuit Court of Appeals.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Nos. 259 and 260—October Term, 1947.

(Argued April 14, 1948 Decided June 16, 1948.)

Docket Nos. 20970 and 20971.

UNITED STATES OF AMERICA,
Libelant-Appellant,

v.

KENT FOOD CORP. and CLARK-IGER FOOD PRODUCTS CO., INC.,
Claimants-Appellees.

Before:—SWAN, CLARK and FRANK,
Circuit Judges.

Appeal from the District Court of the United States for the Eastern District of New York.

Libels by the United States of America against 215 cases, more or less, and 902 cases, more or less, each case containing 24 bottles of an article labeled in part: "Michigan Brand Grade A Tomato Catsup Contents 14 Oz. Avoir. * * *," for seizure and condemnation as adulterated food

in interstate commerce in violation of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. §334, wherein Kent Food Corp. and Clark-Iger Food Products Co., Inc., as claimants and owners, filed a motion for an order approving a consent to a decree of condemnation permitting release of the articles to claimants for export purposes only. From a decree entered upon the claimants' motion, libelant appeals. Reversed and remanded.

JOHN T. GRISBY, Atty., Dept. of Justice (J. Vincent Keogh, U. S. Atty., and Morris K. Siegel, Asst. U. S. Atty., both of Brooklyn, N. Y., and James B. Goding, Atty., Federal Security Agency, on the brief), *for appellant.*

DAVID BERGNER, of New York City (Bergner & Bergner and Samuel H. Friedman, all of New York City, on the brief), *for appellees.*

CLARK, *Circuit Judge*:

This appeal presents the question whether food condemned as adulterated in interstate commerce under the prohibition of the Federal Food, Drug, and Cosmetic Act, §304, 21 U. S. C. A. §334, may be released to the owners for export to another country. The district court, in an endeavor to conserve food available for human consumption and relying upon a provision of the Act exempting food products intended for export, §801 (d), 21 U. S. C. A.

§381 (d), held in favor of the claimant owners. The United States has appealed, contending that such action is beyond the court's power.

Here two libels were filed on February 26, 1947, for the seizure and condemnation of two lots of tomato catsup shipped in interstate commerce in November, 1946. Kent Food Corp. claimed the 215 cases involved in the first libel. It also claimed 441 of the 902 cases attached in the second libel, while Clark-Iger Food Products Co., Inc., claimed the remaining 461 cases. Claimants without answering moved "for an order approving a consent" to a decree of condemnation entered on condition that an order be made directing the United States Marshal to release the catsup to the owners and permit them to sell it for export purposes only. The district court accepted the claimants' contention that the catsup was packed for export when it was seized, stating that the adulteration consisted of high mold count, but that the goods were still fit for human consumption. Accordingly it entered a decree containing first an order of condemnation of the articles to the United States of America and then successive orders providing for their release by the Marshal to the claimants upon the filing of a bond conditioned in appropriate detail for the packing of the articles for export and shipment out of the country, in compliance with the provisions of 21 U. S. C. A. §381 (d) and under the supervision of the Food and Drug Administration of the Federal Security Agency. Thereupon the United States moved for a reargument, pointing out, among other things, that the Kent Food Corp. had actually been selling the adulterated articles for domestic consumption. The court granted the reargument and it adhered to its original ruling, even though it now found "that the claimants did not intend to export the goods, but planned to dispose of them in the domestic market." It held that it had power in its discretion to permit the ex-

port of the goods under proper restrictions and was not required to order them destroyed.

The appeal of the United States is based upon an asserted lack of power of the district court thus to dispose of condemned articles. In supporting its position, the Government also asserts that the court's holding has the effect of destroying the efficacy of the original order of condemnation, since it permits and encourages persons subject to the Act to gamble upon compliance, knowing that the penalty for violation will be only an order for sale in the export trade. The only power of the Government to condemn is statutory, and hence our problem is solely one of statutory construction.

Subdivision (a) of 21 U. S. C. A. §334 makes liable to condemnation any article of food "that is adulterated or misbranded when introduced into or while in interstate commerce." Subdivision (d) of the same section provides for the disposition of condemned food by "destruction or sale" as the court may direct, with the direction that it shall not be sold contrary to the provisions of the Act or the laws of the jurisdiction in which it is sold, and with the further proviso that, upon the claimants paying the costs and executing a bond conditioned that the article shall not be sold or disposed of contrary to the provisions of the Act or the laws of any state or territory in which sold, "the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this chapter under the supervision of an officer or employee duly designated by the Administrator." 21 U. S. C. A. §342 (a) (3) states that a food shall be deemed to be adulterated "(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food."

In a separate chapter of the Act, dealing with imports and exports, it is provided that a food "intended for ex-

port shall not be deemed to be adulterated or misbranded under this chapter if it (1) accords to the specifications of the foreign purchaser, (2) is not in conflict with the laws of the country to which it is intended for export, and (3) is labeled on the outside of the shipping package to show that it is intended for export." 21 U. S. C. A. §381 (d). The section goes on to provide: "But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this chapter."

Thus the language of this last section deals with a subject matter entirely apart from that of condemnation under §334. Here we have the statement of an *exemption* from the operation of the Act. Sec. 334 deals, however, with the consequences of a violation of the Act by introducing an adulterated article into interstate commerce; and subd. (d) sets forth sanctions and remedies for such violation. Thus the part of the section which deals with release to the owner expressly provides either for destruction of the article or for its being brought into compliance with the provisions of the Act. It is further made clear that the article is not to be sold contrary to the provisions either of the Act or the laws of the jurisdiction in which it is sold. There is no provision for a sanction by way of a delayed exemption for export purposes, such as might have been secured had the articles been originally intended for such purposes. The district court did not consider that these articles were being brought into compliance with the law; indeed, there was no basis for such a view. The court thought it had discretion to resort, even after the articles had been condemned, to the special exemption granted by the statute.

In this we think the court was in error. The power specifically given to the court to do only certain things upon condemnation of the articles excludes the possibility

of according them a status they might originally have had, had they never been introduced into interstate commerce for the purpose of domestic sale. The clear purpose of the statute appears to be to visit the statutory penalties or sanctions upon articles thus found to be in violation of its provisions. See *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 57, 58; *United States* v. *Dotterweich,* 320 U. S. 277, 280. The practical aspects of the situation would seem to support this construction, for there is nowhere disclosed an intention that a violator of the Act may avoid the consequences of his wrong by then exporting the outlawed goods to some foreign country which will receive them. However laudatory may be the purpose to conserve the food supply (perhaps even of a condiment or relish such as catsup), an attempt to rewrite the Act along these lines seems likely to have the effect of nullifying its chief purposes. The several provisions for extensive remedies of not merely seizure and condemnation, §304, 21 U. S. C. A. §334, but criminal prosecution and injunction, §§301-303, 21 U. S. C. A. §§331-333, also suggest the impropriety of the result reached below. Such limited legislative history as is called to our attention is to the same effect.[1]

Consequently we think that the provisions of the decree appealed from which go beyond the judgment of condemnation and provide for the release under the stated conditions of the articles to the claimants for export abroad are beyond the power of the court. The libels must be re-

1 The United States directs attention to congressional committee reports which emphasized the essential similarity of 21 U. S. C. A. §381(d) with the export exemption provision of the former §2 of the Food and Drugs Act of 1906, 21 U. S. C. A. §2, and argues that this imported an approval of the consistent policy throughout the 32-year life of the Food and Drugs Act, upon the part of the Administration to resist any attempt to effect the export of condemned food in the adulterated condition which was the basis of its condemnation. It cites *United States* v. *Jackson,* 280 U. S. 183, 193, and other cases, to the effect that an administrative interpretation, supported by reenactment of the statute, is entitled to weight in construing the statute.

manded for the elimination of these provisions and for the substitution of provisions appropriate to the condemnation of the articles under 21 U. S. C. A. §334 (d).

Reversed and remanded.

STATUTES CITED.

21 U. S. Code (Federal Food, Drug & Cosmetic Act)

* * * * * *

Section 331: Prohibited Acts:

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded.

Subdivisions b to l, inclusive, are not pertinent to this case.

* * * * * *

Section 333: Penalties—Violation of Section 331

(a) Any person who violates any of the provisions of Section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000.00, or both such imprisonment and fine: but if the violation is committed after a conviction of such person under this Section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000.00, or both such imprisonment and fine.

Subdivisions b and c are not pertinent to this case.

* * * * * * *

Section 334; Seizure—Grounds and jurisdiction

(a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, or which may not, under the provisions of Sections 344 or 355, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any District Court of the United States within the jurisdiction of which the article is found: (*remaining portion of this subdivision is not pertinent to this case.*)

Procedure: multiplicity of pending proceedings:

(b) *This subdivision is not set out because it is not pertinent to this case.*

(c) *This subdivision is not set out because it is not pertinent to this case.*

Disposition of goods after decree of condemnation:

(d) Any food, drug, device, or cosmetic condemned under this Section shall, after entry of the decree, be disposed of by destruction or sale as the Court may, in accordance with the provisions of this Section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this chapter or the laws of the jurisdiction in which sold; *Provided,* That

after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this Chapter or the laws of any State or Territory in which sold, the Court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this Chapter under the supervision of an officer or employee duly designated by the administrator, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. Any article condemned by reason of its being an article which may not, under Sections 344 or 355, be introduced into interstate commerce, shall be disposed of by destruction.

Subdivisions e and f are omitted because not pertinent to this case.

• • • • • •

Section 342: Aduterated food

A food shall be deemed to be adulterated—
Poisonous, insanitary, etc., ingredients

(a) (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or

(2) If it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of Section 346; or

(3) If it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or

(4) If it has been prepared, packed, or held under insanitary conditions whereby it may have became contaminated with filth, or whereby it may have been rendered injurios to health; or

(5) If it is in whole or in part, the product of a diseased animal or of an animal which has died otherwise than by slaughter; or

(6) If its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.

Subdivisions b, c and d are omitted because not pertinent to this case.

• • • • • •

Section 381: Imports and Exports—Imports; examination and refusal of admission

Subdivisions a, b and c are omitted because not pertinent to this case.

Exports:

(d) A food, drug, device, or cosmetic intended for export shall not be deemed to be adulterated or misbranded under this Chapter if it

(1) Accords to the specifications of the foreign purchaser,

(2) Is not in conflict with the laws of the country to which it is intended for export, and

(3) Is labelled on the outside of the shipping package to show that it is intended for export. But if such article is sold or offered for sale in domestic commerce, this sub-section shall not exempt it from any of the provisions of this chapter.

TITLE 28—U. S. CODE.

(JUDICIAL CODE AND JUDICIARY.)

Section 230—Time for making application for appeal or Writ of Error

No writ of error or appeal intended to bring any judgment or decree before a Circuit Court of Appeals for Review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

* * * * * *

Section 347: Certiorari to circuit court of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed.

(a) In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari

either before or after a judgment or decree by such lower Court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

Subdivision b and c are omitted because not pertinent to this case.

Supreme Court of the United States

OCTOBER TERM, 1948.

KENT FOOD CORP. and CLARK-IGER FOOD PRODUCTS CO., INC.,
Petitioners,

AGAINST

UNITED STATES OF AMERICA.

Brief in Support of Petition for Writ of Certiorari.

I.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is not yet reported in the official reports. The opinion as rendered is annexed hereto.

II.

Jurisdiction.

Petitioners seek a review by Certiorari pursuant to 28 U. S. C. A. 347 (a). The date of the order denying the motion to dismiss the appeal is March 1, 1948. The date of the judgment of reversal sought to be reviewed is June 16, 1948 (Record, p. 65). Petition for rehearing was denied by order filed July 19, 1948 (Record, pp. 75 and

76). The mandate of the Circuit Court of Appeals for the Second Circuit was filed in the District Court for the Eastern District of New York on July 21, 1948.

III.

Statement of Case.

A summary statement of the case has been given in the foregoing petition for Writ of Certiorari, and for brevity, the statement is not repeated here.

IV.

Specifications of Error.

(a) The appeal to the Circuit Court of Appeals was not timely taken and it was error to deny the motion to dismiss the appeal.

(b) The export of the condemned articles would be in compliance with the Federal Food, Drug and Cosmetic Act and the Circuit Court of Appeals erred in remanding the decrees for the elimination of the provisions permitting export.

(c) The Federal Food, Drug and Cosmetic Act confers power upon the District Court to release food libelled under the Act for export to a foreign country.

V.

Argument.

There is presented for determination in the instant case, the question whether the Circuit Court of Appeals has correctly interpreted the provisions of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 334 (d).

There is also presented for determination in the instant case, the question whether the denial by the Circuit Court of Appeals of the petitioners' motion to dismiss the appeal to that Court was a nullification of the provisions of 28 U. S. C. 230 relating to the time within which an appeal may be taken from a District Court to a Circuit Court.

THE APPEAL TO THE CIRCUIT COURT OF APPEALS WAS NOT TIMELY TAKEN.

The right to appeal exists only by virtue of a statute conferring such a right. To avail oneself of that privilege, the statute must be strictly complied with. This is a fundamental rule which does not require the support of precedent.

The rule generally prevailing is that the pendency of a motion to vacate or to modify a judgment or order, validly existing and operative, does not postpone, defer or affect the commencement or continuance of the time prescribed by statute or rule of Court for the taking of an appeal (4 *Corpus Juris Secundum* 908, Section 442). The finality of litigation is a prime requisite for the orderly and proper administration of justice. Unless such finality can be obtained, no sanctity will attach to the decrees and judgments of the Court and litigation can and will become endless.

Unless provision is made for the termination of litigation, litigants can never become clear in their rights.

That basically is the reason and the explanation for the rule of *Res Judicata*.

If the Court, after due deliberation has come to the conclusion that it had power to act, its decision should be reviewed by appeal and not by motion to vacate on the ground of lack of authority. A motion to vacate on that ground is a renewal of the original motion.

To hold otherwise would be to permit endless litigation.

For example, an application might be contested on the ground that the Court was without jurisdiction to grant it. On the denial of that application, a new application could be made, again urging, in the same manner, that the Court lacked power. This is an absurdity and could go on *ad infinitum*.

In this case, when the motion was made in the District Court to reargue the motion theretofore made, it was urged that the statute did not grant power to the Court to release the condemned merchandise for export purposes. The government argued, in order to sustain its right to move for reargument that the Court had no authority to permit export and that therefore the decision allowing export was void. This however was the very argument which was advanced in opposition to the original motion for leave to export the merchandise. Obviously, therefore, the motion to reargue was nothing more than a renewal of the first motion and on the same grounds. Under no circumstances could it be deemed to be a motion to vacate a void judgment as contended for by the government. That being the case, and since the Court had already decided the very point in issue that is, whether or not the Court had jurisdiction, the time to review must be measured from the decision on the first motion and is not extended by the second motion.

In the case at bar, the Court overruled the government's contention of lack of authority on the first motion. The government had already had its day in Court. If it disagreed with the ruling, it should have appealed. It chose instead to secure a re-hearing upon which it met with no greater success. By doing so, the government lost the right to appeal by passage of time. No play on words can convert the second motion from a renewal of the first

motion to an independent motion to vacate, as the government argued in opposition to the motion to dismiss the appeal. The government, like any ordinary litigant, is limited to only one attempt in the lower Court. This Court has declared the rule stated above to be the law in *Stevirmac* v. *Ditman*, 245 U. S. 210.

See also *Painter* v. *United Trust Co.*, 246 Fed. 240.

Since an appeal does not lie from an order entered on a motion for reargument or from an order denying a motion to vacate a previous order, it must be held that the government has therefore taken an appeal from the original order and it is subject to the time limitation which is applicable thereto (*Smith* v. *U. S.*, 52 Fed. 2nd 848). See also *Republic* v. *Richfield*, 74 Fed. (2d) 909. Since the appeal when taken, was filed more than three months from the date of the entry of the first order, the appeal was not timely and it should have been dismissed. The learned Circuit Court was in error in denying the petitioners' motion to dismiss such appeal.

The Federal Food, Drug & Cosmetic Act Conferred Power Upon the District Court to Permit the Release of the Libelled Articles for Export Purposes.

The Federal, Food, Drug & Cosmetic Act, Chapter 9 of Title 21 of the United States Code relates to commerce in food, drugs and cosmetics.

It is necessary to bear in mind that any proceedings which are taken under that section and which relate only to a commodity, as distinguished from an individual, are not criminal in nature but relate solely to the control of the sale and distribution in commerce of the various products regulated by that Act. The proceedings at bar are not criminal proceedings directed at an individual and in-

itiated for the punishment of that individual, but are proceedings for the regulation of the sale and distribution in commerce of a lot of tomato catsup.

It is the manifest purpose of the Federal Food, Drug and Cosmetic Act, insofar as the commodity itself is concerned, to establish and provide machinery for the maintenance of certain standards, to the end that the ultimate consumer will not be subject to injury from the use or consumption of improper articles and also to insure that the ultimate consumer will not be misled by false advertising when he purchases such a commodity.

21 U. S. C., 334, subdivision (a) contains provisions for the procedure with respect to libel and condemnation. It is significant that it does not contain a definition of the word "adulterated" although it provides for the libelling and condemnation of articles which are "adulterated".

We must therefore look elsewhere in the Act to ascertain what is meant by the term "adulterated". We find that that word has a flexible meaning. 21 U. S. C. 342 defines food which is "deemed to be adulterated". This definition sets a very stringent standard. We also find that 21 U. S. C. Section 381D provides that an article "shall not be deemed to be adulterated" if it conforms to a stated less stringent standard and is to be exported.

It follows therefore, that the intention of Congress manifestly was to provide different and differing standards of adulteration depending upon circumstances. It is obvious that Congress envisaged the possibility that an article might be deemed adulterated or unadulterated depending upon the destination to which that article is consigned. Congress must have intended and provided for the possibility that a sub-standard article might be subject to condemnation if shipped in interstate commerce and yet be capable of being sold for export if it conformed to the standards of the country to which it is consigned.

In the case at bar, the government contended that the libelled tomato catsup was adulterated because it did not conform to the standards of Section 334a and because it was shipped in interstate commerce. Upon these facts, if true, the goods were liable to proceedings pursuant to Section 334a.

The claimants, on the ground of expediency, elected not to contest the government's allegations and they consented to a decree of condemnation. The export of these same goods was permissible by virtue of 21 U. S. C., 381d. If so exported, they could be sold in compliance with the Act. The attention of the Court is respectfully directed to the fact that at no time has the government ever advanced the contention that these goods do not conform to the standards established by Section 381d. It therefore cannot be denied that the goods do conform to those standards. That being the case, if the goods be shipped for export, they cannot be deemed to be adulterated. If they are not to be deemed adulterated, they may be disposed of without violating the Act and their export is in compliance with the Act.

21 U. S. C., 334d provides, that where goods are libelled and condemned, the Court may direct that the goods so condemned be delivered to the owner to be brought into compliance with the provisions of the Act. It follows from the foregoing, that since in the export trade the goods in question are not to be deemed adulterated, that they can be sold in compliance with the Act.

There is unanimity of opinion in all of the Courts which have construed section 334d that it was the intention of Congress to provide for the regulation of commerce and not for the destruction of goods introduced into commerce. The Courts have consistently ruled that a decree of condemnation does not require the destruction of goods. Condemnation is not synonymous with, nor

does it necessarily entail confiscation (*U. S.* v. *43½ gross Prophylactics*, 65 Fed. Supp. 534 Aff'd, *Gelman* v. *United States*, 159 Fed. [2d] 881). The Courts have construed the Act to mean that when goods introduced into commerce are found for one reason or another to be in violation of the Act, these goods may be libelled, and if something can be done to these goods so that they will no longer offend against the Act, they may be released. That is exactly what was done in the case at bar. To insure that this will properly be done, provision is made for release under bond and subject to supervision by governmental agency.

See also *United States* v. *43½ gross Prophylactics, supra; United States* v. *935 cases Tomato Puree*, 65 Fed. Supp. 503; *A. O. Anderson* v. *United States*, 284 Fed. 542; *United States* v. *893 cans*, 45 Fed. Supp. 467.

The Circuit Court of Appeals, in reversing the decree of the District Court, in the case at bar, suggested that to permit the release of the goods might result in the avoidance by a violator of the consequences of his wrong. No such result need be feared because the statute contains its own penalties. It provides for criminal punishment of the violator. 21 U. S. C., 333. These penalties are very severe.

The learned Circuit Court referred to the case of *Hippolite Egg Co.* v. *the United States*, 220 U. S. 45, as a precedent for its determination that the Statute requires the destruction of the libelled goods. The assumption is unwarranted. The *Hippolite* case established nothing more than the "original package" doctrine. It was held in that case that where adulterated goods had reached their final destination but were still in the original package, these goods could be condemned even though they were, strictly speaking, no longer moving in interstate commerce. That case established the rule to be, that the

goods are to be deemed still to be in interstate commerce even when they have reached the premises of the consignee, if at the time when proceedings are brought, the goods are in the same original unbroken package in which they were shipped in interstate commerce. That case has no relation to the power of the Court to permit that the goods be used. That question was not considered.

In its opinion, the learned Circuit Court adopted a strained construction of the last sentence of 21 U. S. C. 381 (d). That sentence, referring to articles deemed not to be adulterated because intended for export reads as follows:

> "But if such article is sold or offered for sale in domestic commerce, this sub-section shall not exempt it from any of the provisions of this chapter."

The learned Circuit Court of Appeals ruled that Section 381d, by virtue of this qualifying provision, confers a transitory exemption upon goods intended for export. Such an interpretation destroys the very purpose of the Act. A fair construction of that sentence indicates that what was meant by Congress was, that if goods are marked for export, they are nevertheless subject to condemnation if they are in fact sold in Domestic Commerce. As soon as they are removed from Domestic Commerce and either diverted or restored to foreign commerce, they may be exported.

The learned Circuit Court further based its decision in part upon a state of facts which finds no support in the record. The learned Circuit Court referred to a declared administrative policy to refuse to approve the diversion for export, of condemned food in the very condition which was the basis of condemnation, even though such condition is not violative of 21 U. S. C. 381 (d). Nowheres in the

record is there any reference to this assumed administrative policy. It is true that in the brief submitted in the Circuit Court, reference was made by the government to some unreported decisions of a District Court. Such brief however cannot be considered to be part of the record because the Court of original jurisdiction had no opportunity to verify the citation or to determine its pertinence.

The learned Circuit Court further stated in the course of its opinion that the District Court had found as a fact that the goods must be deemed adulterated because they had in fact been offered in domestic commerce. This finds no support in the record. The District Court did not find as a fact that the goods had been offered for sale in domestic trade (see Record, p. 45, fol. 134 from which it clearly appears that the District Court made no finding of fact but merely stated that even if that fact were true, its decision would remain unaffected thereby). There was no warrant for the conclusion of the Circuit Court that the District Court had ruled that the claimants were violators of the Act. The fact remains and the record discloses that no part of the 902 cases of catsup were ever in domestic commerce.

It is conceded by the petitioners and the respondent that there is no reported decision, either of a District Court, of a Circuit Court, or of this honorable Court, with respect to the power of the District Court under the Food and Drug Act to permit the export of condemned goods in the condition which is the basis of their condemnation, in a case where such goods can validly be exported while in such condition. That being the case, persons who deal in the export of foods have no authoritative answer to the question concerning the Court's power. It does not seem to be proper that food which has great monetary value and which is possessed of great nutritional value should be destroyed because wittingly or unwittingly, these goods

were shipped in interstate commerce. An anomaly is presented by a rule which declares that if goods are prepared for export, they may be exported, but if the same goods are wittingly or unwittingly introduced in interstate commerce, they must be destroyed.

There is no justification for having a different rule with respect to goods for export than that which prevails with respect to goods for domestic consumption. It is conceded that with respect to goods for domestic consumption, these goods may be sold in spite of condemnation if the conditions justifying condemnation be cured or removed. There is no valid reason for applying a different rule with respect to goods intended for export, especially since the statute makes no such exception.

This matter is of great importance to the claimants and to the export trade in general because large amounts of money are involved. This Honorable Court can very well understand that there are times, when unknown to the owner, goods which do not conform to the high standards prevailing for domestic consumption but which do meet the standards for export may, through such lack of knowledge or information, be shipped in interstate commerce. It would be violative of the spirit of the Act to deny to the owner of those goods the opportunity to export these goods.

It is respectfully submitted therefore, that since the purpose of the Federal Food, Drug & Cosmetic Act was to control commerce in certain products, that it is not the purpose of the Act to affect the destruction of goods which meet the standards established by the Food and Drug Act. If goods can be treated in such a manner that they do conform to the standards established by the Act, their release may be directed by the Court for sale in the United States. If the goods are in the condition where they either

can conform or be made to conform to the standards of a foreign country, they may be exported provided they are labelled so as to indicate that they are intended only for export purposes. In the case at bar, since the libelled tomato catsup conformed to the standards of many foreign countries, they can be brought into compliance by labelling which will indicate that they are intended for export and the Court can release them for such export under conditions which will insure that there will be no diversion from such export trade.

The foregoing is respectfuily submitted.

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